

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

ORIGINAL

74-1412

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

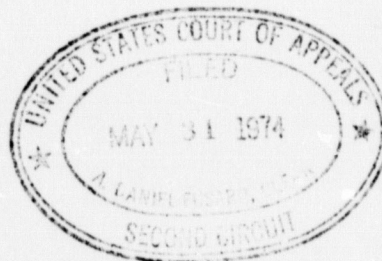
v.

NICHOLAS VOWTERAS and NESTOR VOWTERAS,
Defendants-Appellants.

*On Appeal From The United States District
Court for The Eastern District of New York*

APPELLANTS' APPENDIX

JACOB P. LEFKOWITZ
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DOCKET ENTRIES

- 6/12/73 - Before JUDD, J.-Indictment filed.
- 6/21/73 - Before JUDD, J.-Case called-DEFTS AND COUNSEL PRESENT-Deft BARON pleads not guilty-Deft NICHOLAS VOWTERAS and N. VOWTERAS pleads not guilty-Trial set for 9/17/73.
- 6/22/73 - Notice of Appearance filed. (3 defts)
- 9/14/73 - Before JUDD, J.-Case called-Ajd to 10/23/73
- 10/18/73 - Magistrate's Mile 73 M 151 inserted into CR file.
- 10-23-73 - Before Judd J - Case called-defts & counsels present-adjd to Oct 29, 1973 (trial)
- 10-29-73 -Before Judd J-Case called-attys for both sides present-defts not present-adjd to Nov. 5, 1973 for trial.
- 11-5-73 -Before JUDD J - Case called-adjd to Nov. 7, 1973. (Trial)
- 11-7-73 -Before JUDD, J-Case called & adjd to Nov. 26, 1973 for Trial.
- 11-26-73 -Before JUDD, J.-Case called-Defts not present-Counsel present-Deft Baron's motion to sever-Decision reserved-Case adjd to 11-27-73 at 12:00 P.M. for trial
- 11-27-73-Before JUDD J-Case called-defts & counsels present-deft BARON renews motion to sever-Motion denied-Trial ordered and BEGUN. Jurors selected and sworn-trial contd to Nov. 28, 1973.
- 11-28-73-Before JUDD J-Case called-defts & counsels present-trial resumed-Govt opens-deft Baron waives opening-defts NICHOLAS & VOWTERAS open-trial continued to Nov. 29, 1973.
- 11-29-73-Before JUDD, J.-Case called-Deft and counsel present-Trial resumed-Trial contd to 11-30-73 at 1:30 P.M.
- 11-30-73-Before JUDD, J-Case called-defts & counsels present-trial resumed-Trial contd to Dec. 3, 1973 at 10:30 am.
- 12-3-73-Notice of Appearance filed (indicating new address for counsel for defts NICHOLAS & NESTOR VOWTERAS.)
- 12-3-73-Before JUDD, J-Case called-defts & counsels present-Trial resumed-Govt rests-defts motion to dismiss all motions denied-Deft BARON or deft VOWTERAS' motion for mistrial-motion denied-Trial contd to 12-4-73.
- 12-4-73-Before JUDD, J-Case called-defts & counsels present-Trial resumed-Deft VOWTERAS' motion to sever-motion denied-Trial contd to 12-5-73.

DOCKET ENTRIES

- 12-5-73-Before JUDD, J.-Case called-Defts and counsel present-Trial resumed-Deft Baron rests-Deft Baron's motion to sever denied-Trial contd to 12-6-73
- 12-6-73-Before JUDD, J.-Case called-Defts and counsel present-Trial resumed Deft Vowteras rests-All sides rest-Defts' Motions' to dismiss-All motions denied-Deft Vowteras's case reopened for one witness-Defts' sum up-Govt sums up-Judge charges Jury-Marshals sworn-Alternates discharged-Jury retires to deliberate at 4:15, P.M.-Order of sustenance signed-Jury deliberations contd to 12-7-73
- 12-6-73-By JUDD, J.-Order of sustenance filed
- 12-7-73-7 Volumes of stenographers transcripts filed (one dated Nov. 27, 1973 at 2:15 PM and 6 volumes (pgs 1 to 1169)
- 12-7-73-Before JUDD, J.-Case called-Defts and counsel present-Trial resumed-Jury resumes deliberations at 9:35 A.M.-Order of sustenance signed-Jur returns at 4:15 P.M. and renders a verdict of not guilty on all counts as to deft Baron and as to deft Nicholas Vowteras guilty on counts 1 and 4 and not guilty on count 2 and 3 and as to deft Nestor Vowteras guilty on counts 1-4-Jury polled-Trial concluded-Jury discharged. Judgment of Acquittal ordered as to deft Baron-Case adjd without date for sentencing as to deft Nicholas and Nestor Vowteras-Bail conditions contd as to defts Nicholas and Nestor Vowteras
- 12-7-73-By JUDD, J.-Order of sustenance filed
- 12-7-73-By JUDD, J.-Judgment of Acquittal filed (MURRAY BARON)
- 12-12-73-Requests to Charge (deft Murray Baron) filed.
*received from Chambers)
- 12-12-73-Requests to Charge filed (NICHOLAS & NESTOR VOWTERAS)
- 12-12-73-Govts Requests to Charge filed (received from Chambers)
- 12-13-73-Notice of Motion filed, ret. Dec. 21, 1973, for Judgment of Acquittal or in the alternative, a new trial, etc. (NICHOLAS & NESTOR VOWTERAS)
- 12-17-73-2 Stenographers transcripts filed (pgs. 1170 to 1464)
- 12/24/73-Before JUDD, J.-Case called-Counsel for both sides present-Motion for acquittal argued-Motion denied.
- 12/24/73-Govt's Affidavit in Opposition filed.
- 2-19-74-Before BARTELS J-case called-adjd to 2-28-74 for pleading (FRANCES MARIE CANTELMO)

DOCKET ENTRIES

- 2-26-74 - Notice of motion for a new trial and that deft be examined as to his mental competency filed-Memorandum of Law filed-ret. 3-1-74 (NESTOR VOWTERAS)
- 2-28-74 - Stenographers transcript filed dated Dec. 21, 1973.
- 3-1-74 - Before JUDD, J.-Case called-Defts and counsels present-Deft Nicholas Vowterras sentenced to imprisonment for a period of 1 year on counts 1 and 4 to run concurrently-Deft to serve 2 months and execution of balance of sentence is suspended and the deft is placed on probation for 10 months-Execution of sentence stayed pending appeal-Deft advised of right to appeal-Deft Nestor Vowterras sentenced to imprisonment for a period of 1 year-deft to serve 60 days and execution of balance of sentence is suspended and the deft is placed on probation for the remainder of the sentence-Execution of sentence stayed pending appeal
- 3-1-74 - Judgment and Commitment and Order of Probation filed-certified copies to Marshal and Probation (Nicholas Vowterras)
- 3-1-74 - Judgment and Commitment and Order of Probation filed-certified copies to Marshal and Probation (NESTOR VOWTERAS)
- 3-1-74 - Before JUDD, J.-Case called-Deft and counsel present-Defts motion for a new trial, etc. argued and denied (NESTOR VOWTERAS)
- 3-7-74 - 2 stenographers transcripts filed, one dated 3-1-74 at 10:00 am and one dated 3-1-74 at 2:00 PM.
- 3-8-74 - Notice of Appeal filed (both defts)
- 3-8-74 - Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.
- 3-18-74 - Order received from Court of Appeals and filed that record be docketed on or before 3-28-74 (NESTOR VOWTERAS)
- 3-18-74 - Order received from court of appeals and filed that record be docketed on or before 3-28-74 (NICHOLAS VOWTERAS)

INDICTMENT

A4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

73CR 503

UNITED STATES OF AMERICA

-against-

MURRAY BARON,
NICHOLAS VOWTERAS and
NESTOR VOWTERAS,

Defendants.

INDICTMENT

CR. NO. _____

[T. 18, U.S.C., §371]
[T. 18, U.S.C., §201(b)]
[T. 18, U.S.C., §2]

JUN 12 1973

THE GRAND JURY CHARGES:

COUNT ONE

1. At all times hereinafter mentioned, the defendant MURRAY BARON was a Certified Public Account representing the Argo Compressor Service Corporation, located at 19-35 Hazen Street, Jackson Heights, Queens, New York.
2. At all times hereinafter mentioned, the defendant NESTOR VOWTERAS was the Secretary and Treasurer of the aforesaid Argo Compressor Service Corporation.
3. At all times hereinafter mentioned, the defendant NICHOLAS VOWTERAS was the President of the aforesaid Argo Compressor Service Corporation.
4. On or about and between the 11th day of October, 1972, and the 27th day of December, 1972, both dates being approximate and inclusive, within the Eastern District of New York, the defendants MURRAY BARON, NESTOR VOWTERAS and NICHOLAS VOWTERAS, together and with each other, did knowingly, wilfully and unlawfully combine, conspire, confederate and agree to violate Title 18, United States Code, §201(b) in that they did agree to offer to bribe and agree to bribe a Revenue Agent and employee of the Internal Revenue Service, Kenneth Cooley, in connection with the said Kenneth Cooley's official audit of the U. S. Corporation Income Tax Return for

the fiscal year ending September 30, 1971, of the Argo Compressor Service Corporation.

In furtherance of and for the purpose of effecting the objects of the aforesaid conspiracy, the defendants MURRAY BARON, NESTOR VOWTERAS and NICHOLAS VOWTERAS committed, within the Eastern District of New York, the following:

O V E R T A C T S

1. On or about the 11th day of October, 1972, the defendant MURRAY BARON had a conversation with Revenue Agent Kenneth Cooley concerning the Internal Revenue Service audit of a tax return filed on behalf of the aforesaid Argo Compressor Service Corporation.

2. On or about the 29th day of November, 1972, the defendants MURRAY BARON and NICHOLAS VOWTERAS had a conversation with Revenue Agent Kenneth Cooley concerning the Internal Revenue Service audit of a tax return filed on behalf of the aforesaid Argo Compressor Service Corporation.

3. On or about the 21st day of December, 1972, the defendant MURRAY BARON gave Five Hundred (\$500.00) Dollars in United States currency to Revenue Agent Kenneth Cooley.

4. On or about the 21st day of December, 1972, the defendant NESTOR VOWTERAS gave Revenue Agent Kenneth Cooley Four Thousand Five Hundred (\$4,500.00) Dollars in United States currency.

5. On or about the 27th day of December, 1972, the defendant NESTOR VOWTERAS gave Revenue Agent Kenneth Cooley Ten Thousand (\$10,000.00) Dollars in United States currency. (Title 18, United States Code, Section 371).

COUNT TWO

On or about and between the 11th day of October, 1972, and the 21st day of December, 1972, within the Eastern District of New York, the defendants MURRAY BARON, NESTOR VOUTERAS and NICHOLAS VOUTERAS did, directly and indirectly, corruptly offer, promise and give a thing of value to Kenneth Cooley, an employee of the Internal Revenue Service, United States Department of the Treasury, to wit: the sum of Five Hundred (\$500.00) Dollars in United States currency, for the purpose and with the intent to influence the said Kenneth Cooley to do an official act in violation of the said Kenneth Cooley's duties as an Internal Revenue Agent for the Internal Revenue Service, and for the purpose and with the intent to influence the said Kenneth Cooley, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Kenneth Cooley, acting as aforesaid, to do an act in violation of his lawful duty in respect to the auditing of the 1970 U.S. Corporation Income Tax Return of the Arge Compressor Corporation. (Title 18, United States Code, §201(b) and §2).

COUNT THREE

On or about and between the 11th day of October, 1972, and the 21st day of December, 1972, within the Eastern District of New York, the defendants NESTOR VOUTERAS, MURRAY BARON and NICHOLAS VOUTERAS did, directly and indirectly, corruptly offer, promise and give a thing of value to Kenneth Cooley, an employee of the Internal Revenue Service, United States Department of the Treasury, to wit: the sum of Four Thousand Five Hundred (\$4,500.00) Dollars in United States currency, for the purpose and with the intent to influence the said Kenneth Cooley to do an official act in violation of the said Kenneth Cooley's duties as an Internal

Revenue Agent for the Internal Revenue Service, and for the purpose and with the intent to influence the said Kenneth Cooley, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Kenneth Cooley, acting as aforesaid, to do an act in violation of his lawful duty in respect to the auditing of the 1970 U. S. Corporation Income Tax Return of the Argo Compressor Corporation. (Title 18, United States Code, §201(b) and §2).

COUNT FOUR

On or about and between the 11th day of October, 1972, and the 27th day of December, 1972, within the Eastern District of New York, the defendants NESTOR VOWTERAS and NICHOLAS VOWTERAS did, directly and indirectly, corruptly offer, promise and give a thing of value to Kenneth Cooley, an employee of the Internal Revenue Service, United States Department of the Treasury, to wit: the sum of Ten Thousand (\$10,000.00) Dollars in United States currency, for the purpose and with the intent to influence the said Kenneth Cooley to do an official act in violation of the said Kenneth Cooley's duties as an Internal Revenue Agent for the Internal Revenue Service, and for the purpose and with the intent to influence the said Kenneth Cooley, as aforesaid, to allow and make opportunity for the commission of a fraud on the United States and to induce the said Kenneth Cooley, acting as aforesaid, to do an act in violation of his lawful duty in respect to the auditing of the 1970 U.S. Corporation Income Tax Return of the Argo Compressor Corporation. (Title 18, United States Code, §201(b) and §2).

A TRUE BILL.

FOREMAN.

ROBERT A. MURSE
United States Attorney
Eastern District of New York

1 2B

2

3 Appearances:

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5

BENJAMIN LEWIS, ESQ.,

-and-

6

DAVID L. KITZES, ESQ.,

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Attorneys for Nicholas and Nestor Vowteras

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2 THE COURT: Please, everybody leave the
3 courtroom now so I can spend a little time with
4 the two Vowteras Brothers and their lawyers.

5 (Courtroom cleared.)

6 THE COURT: I suppose, Mr. Lewis --

7 MR. LEWIS: Your Honor, Mr. Nestor Vowteras
8 is hard of hearing and he would like to stand
9 closer.

10 THE COURT: I don't suppose this is a
11 situation where I need have sworn testimony.
12 It is a matter of exploring the intentions and
13 views of the two defendants.
14 Apparently the transcribed conversation on November
15 29th was one between Nicholas Vowteras, Mr. Baron,
16 Mr. Cooley and --

17 MR. LEWIS: Perhaps if I summarized --

18 THE COURT: Mr. Nestor Vowteras was not
19 there.

20 MR. LEWIS: That is true, your Honor.
21 There was no money given or offered on November
22 29th. There was back and forth conversation
23 between the revenue agent, Mr. Baron and Mr.
24 Nicholas Vowteras that frankly could go either way.
25

1
2 THE COURT: He said: I mean I am willing
3 to do anything if we can work something out. It
4 is nobody's business.

5 MR. LEWIS: It wound up as he would send
6 him a turkey for Thanksgiving. Out of context,
7 it could be inculpatory, and in total, it could
8 help us in our defense. At this point, I suggest
9 the agent did go out to a rather noisy restaurant
10 and did not offer to pay, and had drinks on each
11 occasion. It may well be in their minds that the
12 offer of a nominal value would not be in violation
13 of law, although that is always questionable.

14 THE COURT: Well, there is a possibility
15 that this would be interpreted as the initiation
16 of a bribe attempt.

17 MR. LEWIS: That is a possible inference.
18 Of course, we intend to draw the exact opposite
19 inference that this was an inducement that continued
20 from October 11, which is not recorded -- on that
21 day, no offer was made to him, no money was
22 given, and at worst, the suggestion was we were
23 going to send you a turkey for Thanksgiving.

24 The major point I believe, is Nicholas
25 Vowteras did never at any time hand any currency

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2 over to the revenue agent on the final date which
3 is the 27th of December. The transcript will show
4 that Nicholas did enter the room where Nestor
5 Vowtares and the agent were, and did in some words,
6 say: Thank you, have a good holiday, and so forth.
7 Our defense will go to the point that Nicholas
8 did not affirmatively approve of this, he was not
9 there when the money was given. However, there
10 are two major shareholders in a corporation and
11 a check was drawn up, and it would come to his
12 attention. And he did nothing -- he didn't report
13 his brother to the authorities, that is for sure.
14 But did ^{not} completely approve of the transaction.

15 THE COURT: If you can interpret the November
16 29th transaction as not involving an offer of a
17 bribe, and December 21st and 27th transaction as
18 having been conducted by Nestor Vowtares with
19 Nicholas Vowtares not knowing about the withdrawal
20 of the money until afterwards, maybe there would
21 be a separate defense for Nicholas Vowtares.

22 MR. LEWIS: We are very close to a line, and
23 I must agree with the Court.

24 MR. NICHOLAS VOWTERAS: Your Honor, I feel
25 definitely we are in this, otherwise I wouldn't go

1
2 through this. I think we are victims of circum-
3 stance.

4 THE COURT: Well, you have two possible
5 defenses, one, you were led on by the agent and
6 your brother did it, and you didn't have any prior
7 responsibility for it --

8 MR. NICHOLAS VOWTERAS: May I speak openly?

9 THE COURT: Yes.

10 MR. NICHOLAS VOWTERAS: On the first day,
11 Mr. Cooley came in, he indicated he had problems,
12 the man comes in and tells us he bought a house
13 and has expenses, you know. I walked through the
14 place with him and said, I will give you a little
15 air compressor for your tires, in case you have a
16 flat. It is something worth fifty dollars or
17 seventy dollars. It was because my accountant had
18 confirmed to me from the very beginning, and right
19 along, that we never had any problem. I am a
20 mechar's I am a salesman. I don't know anything
21 about books. I take my accountant's word that we
22 have no problems. Why shouldn't I? I wanted to
23 give him a turkey.

24 THE COURT: There came a time when your
25 brother gave \$14,500.

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2 MR. NICHOLAS VOWTERAS: I was at the
3 Executive Association that day. The morning I
4 left the office, I definitely had no idea of
5 any bribe. It was never discussed between Mr. Baron,
6 Mr. Nestor or myself.

7 THE COURT: December 21st --

8 MR. NICHOLAS VOWTERAS: I came back and the
9 next morning I found there was a bribe given, and
10 it was Christmas, the day of our -- I raised holy
11 hell with my brother, what did you do that for,
12 we have no problem. It was already done and he
13 is my brother, what can I do?

14 MR. NESTOR VOWTERAS: Agent Cooley was in
15 December 21, on the Thursday morning with Baron.
16 I let them use my desk. Ten minutes to -- I remember
17 I was only called in one minute. Ten minutes to
18 twelve, they called me in the office about a P&E.
19 "By the time you get back from lunch, I will have
20 it." They came back almost two hours later from
21 lunch. As soon as they came back, Baron grabbed me,
22 "You got \$500 on you?" This is the God's honest
23 truth, I gave him \$500. That's all I know. Then
24 there were long faces between Cooley and Baron. And
25 that's when I got called into the picture. There was

a big five on my brother's desk which I didn't know anything about. "For this here, you want me to take care of that?" What does that mean? I put a one in front of it. He asked me for the five hundred. I didn't put it in the bottle or give it to Cooley.

THE COURT: You may still be responsible if the jury thinks when you gave five hundred dollars to your accountant, you must have known it was going to the agent.

MR. NICHOLAS VOWTERAS: It was the day before Christmas. He could have asked for five hundred dollars for anything.

THE COURT: Five hundred dollars is a lot of money to some jurors. And I have been through bribery trials on five hundred dollars.

MR. LEWIS: The 27th, whatever arrangements with the agent were consummated on the 21st, the 27th was a further execution of the contract."

MR. NESTOR VOWTERAS: He called me on the 26th and said: I will be in tomorrow.

THE COURT: Mr. Nicholas hasn't told me he had any agreement on the 21st.

MR. NICHOLAS VOWTERAS: I wasn't there.

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2 THE COURT: When you came back the next day,
3 you didn't tell me there was any agreement --

4 MR. NESTOR VOWTERAS: I told him it was
5 fifteen thousand.

6 MR. NICHOLAS VOWTERAS: I questioned him
7 as to how come. He has no paper work to show anything
8 for that money. You just don't get fifteen thousand
9 dollars. This is something I questioned.

10 THE COURT: Which one of you is planning to
11 testify?

12 MR. LEWIS: Basically, we thought that Nicholas
13 would testify.

14 I couldn't see what Nestor could add except
15 exacerbate the transcript --

16 MR. NESTOR VOWTERAS: The first thing I had
17 anything to do was December 21st, at two o'clock.

18 THE COURT: Nicholas' testimony would tend
19 to minimize his participation.

20 MR. LEWIS: Yes.

21 THE COURT: And inculcate Nestor.

22 MR. NESTOR VOWTERAS: He didn't know anything
23 about it.

24 MR. NICHOLAS VOWTERAS: If I may speak openly,
25 on the 29th of November, when I was called in without

1
2 any reason to speak to Mr. Cooley by Mr. Baron,
3 and not knowing anything about accounting, Mr. Baron
4 knew I couldn't answer, I was pleading with Mr. Cooley
5 to tell me what is right. "What do you want to do
6 for me?" I don't know how to answer. I didn't want
7 to do anything illegal. Here I am talking about a
8 lot of money, sixty thousand dollars, and my accountant
9 tells me there is no problem. And Mr. Cooley is
10 saying, "What do you want to do? What do you want
11 to do?" If I was weak, and I am not weak -- but I
12 didn't want to do anything illegal. I don't want to
13 go to jail. It's on there.

14 THE COURT: You know, Mr. Lewis, I am worried
15 about this. Each man goes to jail separately if they
16 go. I don't know if a businessman who corrupts
17 agents has to go to jail. If even for a short time.
18 I sent a labor leader out in Long Island to jail for
19 sixty days, and then it was out. I have to treat
20 him the same way I treat a Black man who violates
21 the law. It is quite possible that the brothers may
22 split some time and get separate lawyers on appeal.

23 MR. LEWIS: I try to have them make the
24 decision on this. As far as trial strategy is
25 concerned, I make the decisions. But as far as

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2 choosing attorneys, I let them make the decision.

3 MR. NESTOR VOWTERAS: If we both go, there
4 goes our forty years of business down the drain.

5 MR. NICHOLAS VOWTERAS: We started that
6 way. We all have our convictions and feelings and
7 I was brought in by Mr. Baron and put on the spot
8 and I also felt after he came back on the 22nd of
9 December, Mr. Baron put my brother on a spot, asking
10 for money. I feel we are in this thing, because
11 we are paying an accountant to do a job for us, and
12 right along Mr. Baron knew I wanted to do everything
13 right. I was even looking to go public. He had
14 no business calling me in. My brother had no
15 knowledge of a bribe until Mr. Baron asked him for
16 five hundred dollars. Now, being holiday time, I
17 could understand how my brother felt. We have to
18 go together in this case here.

19 THE COURT: What the Court says here is: The
20 trial Court should have conducted a careful inquiry
21 • to satisfy yourself no conflict of interest would
22 be likely to result. It seems to me a conflict
23 of interest is possible here. Whether it goes
24 beyond and says that the defendant can waive that
25 conflict of interest -- Judge Moore said clients

should have a right to pick their own lawyers.

MR. LEWIS: I know the First Circuit seems to almost ~~per se~~, require separate defendants to have separate attorneys.

THE COURT: Here is the other statement they say: It is in the best interests of justice to reverse and remand for a new trial as to both parties, ~~after the Court has ascertained~~ that either has separate counsel or from the questioning, each understands clearly the possibility of a conflict of interest and waives any right in connection with it.

MR. LEWIS: Yes, sir, I believe I read that one point to his Honor yesterday. I must say I can recommend -- had they not been brothers, good friends, I would have, on my own, recommended separate counsel. We have a special type of problem where you are dealing with brothers in business, and they are close friends as well.

THE COURT: Is it a problem with money? I know when you have counsel in an important matter, it costs a lot of money.

MR. NESTOR VOWTERAS: Our business went down because of this.

THE COURT: I know that happens.

MR. NESTOR VOWTERAS: We are disturbed about this.

THE COURT: I know. People settle cases because of the time involved in trying them.

Let me just say there is a possibility that Mr. Nicholas may get himself off and get Mr. Nestor convicted. There is a possibility both will be convicted. There is a possibility that I would do what the Securities and Exchange did in Shears and Hammill, with four top partners, have the suspensions staggered, so the business wasn't destroyed.

I am inclined to say you should both have a little more time to consider this. It is my judgment that maybe there is a conflict of interest. Maybe Mr. Nestor has the most at stake, because his brother's testimony --

MR. NICHOLAS VOWTERAS: We are in it together.

MR. NESTOR VOWTERAS: Why don't we take a little more time? Maybe we are on the wrong track. Maybe we are not thinking right.

THE COURT: Let Mr. Nestor come back at 2:30 and tell me whether he has any misgivings.

MR. NICHOLAS VOWTERAS: I know my brother. I

really know him.

THE COURT: Which is the older?

MR. NICHOLAS VOWTERAS: I am.

THE COURT: You have no right to tell him what to do, you know. I have known families where an older brother --

MR. NESTOR VOWTERAS: We tell each other what to do. We always have our discussion out in the open.

MR. NICHOLAS VOWTERAS: I know my brother. I know that he will do anything to see that nothing happens to me and I feel the same way about him.

THE COURT: Well, if we have to have separate counsel, we have to have some time to get separate counsel acquainted with the matter. I think it is not considered separate counsel if a partner represents the other defendant.

MR. LEWIS: I wouldn't even want to recommend counsel, I might be compromising his position.

THE COURT: You come back at 2:30 and talk to me privately, or twenty minutes after two. My watch says 13 minutes after one.

MR. LEWIS: We will abide by his Honor's watch.

THE COURT: Twenty after two by the right time.

1 15B

2 MR. LEWIS: For the record, it is understood,
3 this record --

4 THE COURT: This record is sealed.

5 MR. LEWIS: It would be available to me?

6 THE COURT: It is available to you.

7 It should have separate page numbers from any
8 other transcript in the case, if it is ordered.

9 MR. LEWIS: Yes, your Honor, I would like
10 to have it.

11 (A recess was taken at this time until
12 2:20 P.M.)

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SS:fs

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(The following occurred in camera)

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THE COURT: This is an in camera proceeding. Have you had time to think about the matter?

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MR. NESTOR VOWTERAS: Yes, sir.

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THE COURT: I pointed out this morning it might be possible that your brother's testimony would convince the jury that he was innocent, and that your not testifying might result in your being convicted. Have you decided if you want a separate lawyer?

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MR. NESTOR VOWTERAS: Yes. I have decided. I have decided with Mr. Lewis.

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THE COURT: You have a right to apply now to get a separate lawyer and to have an adjournment for that purpose. I want to be sure you're waiving that right.

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MR. NESTOR VOSTERAS: I'm waiving that right, sir.

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THE COURT: If you're convicted and if there is another lawyer who comes in to represent you and he argues that you should have had a separate lawyer, I want you to know, now is the time.

MR. NESTOR VOWTERAS: That's right.
You mentioned it to me enough times.

THE COURT: You have had time enough
to think about it?

MR. NESTOR VOWTERAS: Yes.

THE COURT: It's a serious matter.

MR. NESTOR VOWTERAS: Yes, I know how
serious it is.

THE COURT: I can appreciate your
feelings. You have a right to choose your
own lawyer. I can't tell you to select some-
body else. All I can tell you is you run a risk
by keeping the same lawyer. Are you clear in
your mind you want Mr. Lewis to represent
both you and your brother?

MR. NESTOR VOSTERAS: Yes.

THE COURT: Have Mr. Lewis and your
brother come in.

(Mr. Nestor Vowtereras leaves the room.)

(Mr. Nicholas Vowtereras enters the room.)

THE COURT: Your brother said he has
decided he wants to go along with Mr. Lewis.
He waives his right, even though it may result
in your winding up being acquitted or his being

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2 convicted. There is another possibility, of
3 course. Nobody knows what will happen when
4 you're cross-examined. It might wind up the
5 jury will convict you on the basis of what you
6 say and with respect to your brother they'll
7 acquit him.

8 MR. NICHOLAS VOWTERAS: I understand that.

9 THE COURT: I want to be sure you know
10 you're taking a risk and are you still willing
11 to have Mr. Lewis represent you both?

12 MR. NICHOLAS VOWTERAS: Yes.

13 THE COURT: You have a right to ask for
14 time to get another lawyer if you want, or have
15 your brother get another lawyer.

16 MR. NICHOLAS VOWTERAS: Yes.

17 THE COURT: I didn't ask him, but is
18 his decision as a result of pressure by you
19 as the older brother?

20 MR. NICHOLAS VOWTERAS: No.

21 THE COURT: He said he runs things, too.
22 Is your decision the result of any
23 pressure by him?

24 MR. NICHOLAS VOWTERAS: No.

25 THE COURT: You're reaching it voluntarily?

MR. NICHOLAS VOWTERAS: Yes.

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2 THE COURT: Get everybody in, please.

3 (The following occurred in open court.)

4 THE COURT:/ I have questioned both
5 brothers separately and I pointed out that
6 either one may wind up going to jail while
7 his brother is acquitted, and they both said
8 they want you to represent them both.

9 I think a man has a right to choose
10 his own lawyer. I have told them I would give
11 them an adjournment if they want to get separate
12 counsel.

13 MR. LEWIS: May I say I appreciate the
14 Court's indulgence.

15 THE COURT: Look, I am trying to protect
16 myself.

17 MR. LEWIS: And the rights of the clients.

18 THE COURT: And the clients' rights to
19 be represented. I think there are also risks
20 in having two brothers represented by separate
21 • counsel as if they were divergent.

22 MR. LEWIS: It's a very difficult
23 decision.

24 THE COURT: I'm going to let you represent
25 them both.

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MR. LEWIS: Thank you.

THE COURT: As soon as everybody is here,
I'll proceed.

MR. LEWIS: May I ask you for one re-
quest: I notice Mr. Washor took the end seat.
Mr. Nestor Vowterras' ear doesn't operate.
I would prefer to seat him there and ask
Mr. Washor to move over.

THE COURT: Yes.

The part from this noon until now is
to be sealed and not disclosed to anybody until
I give directions.

MR. LEWIS: When will we get a copy of
this transcript, your Honor?

THE COURT: Of what?

MR. LEWIS: The transcript of the in
camera proceeding.

THE COURT: I don't think you should
have a copy.

MR. LEWIS: I was advised otherwise
earlier, not with respect to the individuals,
I agree, but I was present before lunch, in
the in camera proceeding.

THE COURT: That part. Are you on daily?

MR. LEWIS: Yes.

THE COURT: You'll have it tomorrow.

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2 MR. WASHOR: I haven't got a case to
3 back me up, Judge. I won't even say that I
4 researched the law to support our position
5 except that via the order of indictment
6 I would suggest that we be permitted to sit
7 in the order closest to the jury as we can.

8 THE COURT: I don't like to have to
9 decide about it. The one thing that concerns
10 me is that Nestor Vowteras is the defendant.
11 He is entitled to hear what's going on. If
12 he can't hear, you're prejudicing his rights.

13 I don't think the jury should be
14 affected by where a particular person sits.

15 MR. WASHOR: That sandwich is frankly
16 the reason we're here. You must recognize
17 that in the approach to a trial in a defense,
18 Judge, sometimes the unpleasant task --

19 THE COURT: Is that Mr. Baron sitting
20 with you now?

21 MR. WASHOR: Yes.

22 THE COURT: You would have him with his
23 back to the jury. You should sit the other way.

24 MR. LEWIS: I suggest Mr. Washor should
25 move to the other end of the table. He will be

1
2 just a piece of bread in the sandwich.

3 THE COURT: For five years I had the
4 jury tables lengthwise instead of crosswise.
5 I changed them because there was a feeling
6 it gave a little preference to the Government
7 and I think at least one of the other judges
8 has them permanently crosswise. If you're
9 at the far end of the table, you're no farther
10 away than you would have been if I had them
11 lengthwise.

12 MR. WASHOR: If that is a suggestion,
13 I don't accept it. If it's a direction --

14 THE COURT: I would direct it. I don't
15 think there is any such prejudice.

16 MR. LEWIS: We will all submit a brief
17 on this later, Judge.

18 MR. BERGMAN: One brief matter. I think
19 I made a comment before we broke for recess
20 that Mr. Cooley would not in the normal course
21 have seen that comment on one of the personal
22 papers.

23 THE COURT: Somebody may very well have
24 told him why.

25 MR. BERGMAN: He is aware. I think he

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2 is aware of that particular comment. I just
3 want to set the record straight. I don't know
4 exactly when he became aware of it.

5 MR. KITZES: Are you finished with the
6 3500 material?

7 THE COURT: Yes. I have talked briefly
8 with both Mr. Nestor Vowteras and Mr. Nicholas
9 Vowteras and pointed out the possibility of
10 conflict, and they have waived any rights they
11 may have to have it delayed to get separate
12 counsel, and I think that the right to have
13 counsel of your own selection plus the risk
14 that may be involved in having two brothers
15 appear to be struggling between each other
16 justifies my permitting Mr. Lewis to continue.

17 MR. BERGMAN: Thank you, your Honor.

18 MR. WASHOR: There was left open the
19 question of whether you would reveal to counsel
20 for the defendant Baron as to whether or not
21 one or both of the accused Vowterases would
22 be exercising their Fifth Amendment right.
23 I would press the Court to make such a revela-
24 tion, recognizing, of course, it is subject to
25 change.

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2 THE COURT: No, I don't think I should.
3 I have ruled on that before. You'll have to
4 be in the same position that you would be in
5 a joint trial where I had not conducted such
6 an in camera inquiry. Motion denied. You
7 have an exception.

8 MR. WASHOR: Your Honor, one further
9 point of procedure. Recognizing the right of
10 the Government to cross-examine any defense
11 witness and the defendants, does the Court
12 have an order of preference regarding co-counsel
13 conducting examination of witnesses?

14 THE COURT: Normally, on the Government's
15 witnesses, I would expect you to cross-examine
16 first and then Mr. Lewis, unless you decide other-
17 wise. On defense witnesses, I would expect
18 the co-defendant to examine before the Govern-
19 ment cross-examines.

20 MR. WASHOR: Fine.

21 MR. LEWIS: Also true of opening and
22 closing statements.

23 THE COURT: Openings and closings would
24 be, unless otherwise determined by the defendants,
25 in the order named. Mr. Bergman would open.

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2 Mr. Washor would open for the defendant Baron
3 if he wished,, and then you might open for the
4 others, and in summations, Mr. Lewis, Mr. Washor,
5 and Mr. Bergman, unless you decided otherwise.
6 I have had defense counsel vary the order
7 from time to time.

8 MR. WASHOR: I would suggest that that
9 being the rule of the forum, so to speak,
10 I would abide by it.

11 THE COURT: All right.

12 MR. WASHOR: Permitting me, because
13 of the name in the indictment, chronological
14 order, to sum up last for the defense.

15 THE COURT: Yes.

16 MR. LEWIS: I will reserve objection
17 if I feel there is some reason of prejudice,
18 your Honor.

19 THE COURT: Fine.

20 Call up the jury.

21 Let me have the names of the people
22 who are with you at counsel table.

23 MR. BERGMAN: Robert Schultz.

24 THE COURT: Revenue agent?

25 MR. SCHULTZ: Inspector.

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MR. BERGMAN: And Mr. Lewis Rosenbluth.

MR. ROSENBLUTH: I'm an inspector also.

THE COURT: Are either of these men going to be witnesses?

MR. BERGMAN: Mr. Rosenbluth is a potential witness, I suppose for the defense, in view of what you heard said earlier today. I don't intend to put him on today as a Government witness.

THE COURT: I always let one case agent stay at counsel table. I think if he's not a Government witness I'll let him do so.

MR. BERGMAN: Thank you, your Honor.

CHARGE TO THE JURY

* * *

10 THE COURT: Counsel and defendants,
11 Miss Barrett, ladies and gentlemen:

12 You have listened to the evidence and the
13 arguments of counsel. You have a lot on your
14 mind, but it's now my duty to give you the
15 instructions as to the law which is an important
16 part of the case. I will have various written
17 notes that I will use because I try to be as
18 accurate as possible, but I have not been able
19 to put everything together in one document.

20 I had the transcripts collected from your
21 seats because I'm not going to use them in my
22 instructions.

23 The jury is the last word on the facts,
24 but you have to follow the law as I give it
25 and assume that I am right. What I do in a

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2 charge to a jury generally to tell them first
3 about the general principles that apply to all
4 criminal trials, then the nature of the charges
5 in this case and the specific rules of law that
6 apply to those charges, and then something about
7 how to evaluate the evidence you have heard and
8 how to reach a verdict.

9 The parties in the case are the United
10 States, Murray Baron, Nicholas Vowteras and
11 Nestor Vowteras. Mr. Cooley was a Government
12 witness, but he is not a party. It's his
13 credibility that may be involved, but the dispute
14 is between the United States and the defendants.

15 In our adversary system of criminal justice
16 it is the duty of the prosecutor to do his best
17 to present the Government's case, and the
18 defense counsel to do their best to represent
19 their own clients interest. And I enforce the
20 rules of evidence. And you decide the truth or
21 falsity of the testimony within the applicability
22 of the facts you find to the rules of law. You
23 are to resolve the conflicts in the evidence.
24 You may draw such reasonable inferences as are
25 warranted by the testimony or the exhibits. And

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2 with respect to any fact matters, your recollection
3 is what governs, subject to your right to ask
4 for the minutes to be read if you desire.

5 You are to perform your duty without bias
6 or prejudice for or against any party. The law
7 does not permit jurors to be governed by sympathy
8 or prejudice or public opinion. The law presumes
9 that a defendant is innocent of crime and the
10 law permits nothing but legal evidence received
11 here in the courtroom to be considered by a jury
12 in connection with the charge against an accused.

13 The presumption of innocence is enough
14 in and of itself to acquit a defendant, unless
15 twelve jurors are satisfied beyond a reasonable
16 doubt of the defendant's guilt from all the
17 evidence in the case.

18 I will say a few words about how reasonable
19 doubt is interpreted. A reasonable doubt is a fair
20 doubt based on reason and common sense. It may
21 arise from the state of the evidence or from the
22 failure of the Government to produce evidence on
23 a material issue.

24 A reasonable doubt doesn't mean a doubt
25 that a juror seizes because he doesn't want to

1
2 perform an unpleasant task or because he has
3 sympathy that we naturally do have.

4 Doesn't mean beyond any doubt. It's
5 rarely possible to prove anything to an
6 absolute certainty. And the law doesn't require
7 this.

8 Courts have sometimes said that proof
9 beyond a reasonable doubt means a doubt such as
10 would make you hesitate to act in your own
11 important affairs.

12 This proof beyond a reasonable doubt
13 operates on the whole case. It doesn't mean that
14 each bit of evidence must be proved beyond a
15 reasonable doubt. But it means that the sum
16 total of the evidence from the Government and from
17 the defendant on direct examination and on
18 cross-examination must satisfy you beyond a
19 reasonable doubt as to each and every element of
20 the crime charged, or else you must acquit.

21 And I will describe the elements later.

22 When you weigh the evidence, and if the
23 evidence reasonably permits either of two
24 conclusions, one of innocence and the other of
25 guilt, then you have a reasonable doubt and you

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2 have to adopt the conclusion of innocence and
3 acquit the defendant or defendants. But if you
4 are convinced beyond a reasonable doubt of the
5 guilt of any defendant on any count, it's your
6 duty to bring in a verdict of guilty on that
7 count.

8 Finding a citizen to be guilty of a felony
9 and subjecting him to criminal penalties is
10 a serious matter, particularly serious for a
11 professional man like an accountant. It is
12 serious even for a businessman who has lived
13 his career thus far without any conviction.
14 You can consider this matter in deciding whether
15 you have a reasonable doubt.

16 But as I have said, if you are convinced
17 beyond a reasonable doubt of a defendant's guilt,
18 then you should find him guilty and not be
19 swayed by sympathy.

20 As I mentioned at the beginning, the law
21 doesn't impose a duty on a defendant in a criminal
22 case to produce any evidence or to testify. A
23 defendant may present himself as a witness, as
24 Mr. Baron and Mr. Nicholas Vowteras did. In that
25 event they become subject to cross-examination,

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2 as you have observed, and their credibility is
3 for you as the jury to determine in the same manner
4 as are the witnesses.

5 You can consider that a defendant has
6 a strong motive to tell the kind of story that
7 will protect himself. But you can also consider
8 that frequently there is nobody else that can
9 tell the story that has arisen in subjecting himself
10 to cross-examination. And you are to decide
11 whether to believe a defendant or how much of
12 his story to believe and what effect that has
13 in the light of the law as I will describe it
14 to you.

15 The fact that one defendant has testified
16 doesn't mean that any other defendant has to
17 testify. You can't draw any inference against
18 Mr. Nestor Vowteras because he didn't testify.
19 As a matter of fact, his words are on tape. Much
20 of what he might have said would very likely
21 duplicate what Nicholas Vowteras has said. At
22 any rate, you can't even talk in the jury room
23 about the fact that Nestor Vowteras did not
24 testify.

25 Now, I come to the indictment. An indictment

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2 is just a formal method of accusing a defendant
3 of a crime. It's not evidence of any crime. The
4 fact that there's been an indictment doesn't
5 create any presumption of guilt. It doesn't
6 permit any inference of any kind.

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2 The defendants have all pleaded Not Guilty.
3 And the indictment and the pleas simply create the
4 issues that you are to decide.

5 The indictment in this case includes four
6 Counts that are going to be submitted to you:

7 One for Conspiracy, and three for giving
8 bribes.

9 The First Count, Count One, reads:

10 At all times hereinafter mentioned, the
11 defendant Murray Baron was a Certified Public
12 Accountant representing the Argo Compressor
13 Service Corporation, located at 19-35 Hazen
14 Street, Jackson Heights, Queens, New York.

15 Two, at all times hereinafter mentioned,
16 the defendant Nestor Vowteras was the Secretary
17 and Treasurer of the aforesaid Argo Compressor
18 Service Corporation.

19 Three, at all times hereinafter mentioned,
20 the defendant Nicholas Vowteras was the President
21 of the aforesaid Argo Compressor Service Corpora-
22 tion.

23 On or about and between the 11th day of
24 October, 1972, and the 27th day of December, 1972,
25 both dates being approximate and inclusive, within

the Eastern District of New York, the defendants Murray Baron, Nestor Vowteras and Nicholas Vowteras, togeth-e and with each other, did knowingly, willfully and unlawfully combine, conspire, confederate and agree to violate Title 18, United States Code, Section 201(b), in that they did agree to offer to bribe and agreed to bribe a Revenue Agent, an employee of the Internal Revenue Service, Kenneth Cooley, in connection with the said Kenneth Cooley's official audit of the United States corporation income tax return for the fiscal year ending September 30th, 1971, of the Argo Compressor Service Corporation.

In furtherance of, and for the purpose of effecting the objects of the aforesaid conspiracy, the defendants Murray Baron, Nestor Vowteras and Nichols Vowteras committed, within the Eastern District of New York, the following overt acts:

One, on or about the 11th day of October, 1972, the defendant Murray Baron had a conversation with Revenue Agent Kenneth Cooley concerning the Internal Revenue Service audit of a tax return filed on behalf of the aforesaid Argo Compressor Service Corporation.

Two, on or about the 29th day of November, 1972, the defendants Murray Baron and Nicholas Vowteras had a conversation with Revenue Agent Kenneth Cooley concerning the Internal Revenue Service audit of said return.

Three, on or about the 21st day of December, 1972, the defendant Murray Baron gave \$500 in United States currency to Revenue Agent Kenneth Cooley.

Four, on or about the 21st day of December, 1972, the defendant Nestor Vowteras gave Revenue Agent Kenneth Cooley \$4,500 in United States currency.

And Five, on or about the 27th day of December, 1972, the defendant Nestor Vowteras gave Revenue Agent Kenneth Cooley \$10,000 in United States currency.

This is charged as a violation of Title 18, United States Code, Section 371.

This Section specifies that if two or more persons Conspire to commit any offense against the United States, or any Agency thereof, and one or more of such persons do any act to effect the objects of the Conspiracy, each shall be fined or imprisoned.

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2 I don't describe what the penalty is, be-
3 cause that is within the determination of the
4 Judge if there is a verdict of Guilty after he
5 has heard all the aggregating or extenuating
6 circumstances that may be brought forward.

7 I will tell you later the elements of the
8 crime of bribery, which is the unlawful act which
9 is charged in connection with the Conspiracy.

10 With respect to the Conspiracy Count, there
11 are four elements that the Government must prove
12 beyond a reasonable doubt. First, that there
13 were two or more persons involved. And it can
14 be Nicholas Vowteras and his brother. It can
15 be Nestor Vowteras and Murray Baron. Or it can
16 be all three of them. Or you can find only one
17 involved. And then there is no Conspiracy.

18 Second, it must be shown that they willfully
19 and knowingly conspired or agreed.

20 Third, that what they agreed to do was an
21 act forbidden by law -- Here, to pay money to
22 influence an official act.

23 And Four, that one of the members of the
24 Conspiracy did an act to carry the Conspiracy
25 into effect.

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2 And that's why the overt acts are men-
3 tioned.

4 While a Conspiracy involves an agreement
5 to violate the law, it is not necessary that the
6 persons who were charged with the Conspiracy
7 entered into an expressed agreement or stated
8 in writing what the scheme was, or even that they
9 had any definite oral agreement. It's enough to
10 show that they came to some mutual understanding
11 to accomplish an unlawful act. An agreement can
12 be inferred from the circumstances and the con-
13 duct of the parties.

14 Each member of the Conspiracy may perform
15 separate and distinct acts.

16 It's necessary for the Government to prove
17 beyond a reasonable doubt that each defendant
18 knew the purpose of the Conspiracy, and was a
19 willing participant with the intent to advance
20 the purpose of the Conspiracy, but not that each
21 Conspirator did any particular overt act. Whether
22 a person is a party to a Conspiracy depends on
23 his individual participation, sometimes described
24 as having a stake in the venture.

25 This does not mean that he must have a

1 financial interest, but that he must have wanted
2 to help the venture succeed.
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4 Mere acquiescence in someone else's acts,
5 being associated with them in legitimate activ-
6 ities, or meeting with co-defendants, or even,
7 in Mr. Baron's case, knowing that the Vowterases
8 intended to give a bribe without preventing them
9 from doing it, wouldn't make Mr. Baron a partici-
10 pant to the Conspiracy, or wouldn't make the
11 others, under the same rules, unless the particular
12 defendant intended and agreed to cooperate in the
13 bribe effort.

14 Even an overt act like putting the bottle
15 by Mr. Cooley's briefcase is not enough in itself
16 to prove that Mr. Baron was a Conspirator, unless
17 he knew that there was money in the bottle, or
18 he intentionally avoided finding out whether
19 there was.

20 In this connection, a Conspiracy requires
21 proof of a state of mind. And state of mind is
22 a fact which the jury can find either from the
23 direct testimony or from circumstances, as I will
24 describe later.

25 When there is proof beyond a reasonable

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2 doubt that there is a Conspiracy, then statements
3 knowingly made and acts knowingly done by any
4 member of the Conspiracy can be considered by the
5 jury as evidence in the case as to the defendants
6 found to be a member, even though they may have
7 occurred in the absence and without the knowledge
8 of the defendant.

9 And while I told you at the beginning that
10 some evidence might not be considered, I think
11 against Mr. Baron, you may consider all evidence
12 against him except the statements that Mr. Nicholas
13 Vowteras made after he was arrested. And I guess
14 Mr. Washor thought that those were helpful to his
15 case and consented that they be considered. And
16 because of this, I said that every co-Conspirator
17 is responsible for whatever any other co-Conspir-
18 ator does in the furtherance of the Conspiracy,
19 whether he knows about it or not, and whether he
20 specifically approves of it or not, as long as
21 he is a member of the Conspiracy. And once a
22 Conspiracy is formed, it's presumed to continue
23 until its objects are accomplished. And the
24 person who is found to be a member is presumed to
25 continue in membership until there is affirmative

proof that he backed out or withdrew.

So if you are satisfied beyond a reasonable doubt that a Conspiracy existed, and that a particular defendant understood the unlawful character of the Conspiracy, and intentionally assisted in furthering it, then you can find that he was a member of the Conspiracy as charged.

The extent of a defendant's participation doesn't determine his guilt or innocence. Some acts are major; some are minor. A defendant may be convicted as a Conspirator, even though he plays a minor part in the Conspiracy.

And you may have noticed as I read the overt acts that some were by Murray Baron, some were by Nicholas Vowteras, and some were by Nestor Vowteras. It is not necessary that each Conspirator participates in an overt act. It is only necessary that you find that one of the overt acts was committed by one of the defendants, or that one of the substantive Counts, which are really set forth in the overt acts, was committed by one of them for the purpose of the Conspiracy at a time when the other defendants were also a part of the Conspiracy.

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2 Now, Counts Two, Three and Four are the
3 direct substantive Counts, as I have called them.

4 Count Two charges that on or about and
5 between the 11th day of October, 1972, and Decem-
6 ber 21st, 1972, the defendants Murray Baron,
7 Nestor Vowteras and Nicholas Vowteras did directly
8 and indirectly, corruptly offer, promise and give
9 a thing of value to Kenneth Cooley, an employee
10 of the Internal Revenue Service, to wit: the sum
11 of \$500 in United States currency, for the purpose
12 and with the intent to influence him to do an
13 official act in violation of his duties as an
14 Internal Revenue Agent, and for the purpose to
15 influence him to allow and make opportunity for
16 the commission of a fraud on the United States,
17 and to do an act in violation of his lawful duty
18 in respect to the auditing of the 1970 United
19 States Corporation Income Tax Return of Argo
20 Compressor Corporation.

21 This is charged as a violation of Section
22 201(b), and Section II, of Title 18 of the United
23 States Code. And I think I will read Section II
24 first.

25 Section II says, Whoever commits an offense

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2 against the United States, or aids, abets, counsels,
3 commands, induces or procures its commission is
4 punishable as a principal.

5 This means that a person who aids in commit-
6 ing a crime is just as guilty as one who actually
7 commits it. So if there was \$500 placed in the
8 bottle and given to Agent Cooley, you can find that
9 Mr. Baron helped, or that Mr. Nestor Vowteras and
10 Nicholas Vowteras helped. And if you think that
11 there was participation by Nicholas Vowteras in
12 this degree, you can also find that he aided and
13 abetted.

14 The substantive offense, Section 201(b), is
15 under a statute which says, "Whoever directly or
16 indirectly corruptly gives or offers or promises
17 anything of value to any public official, or
18 offers or promises any public official to give
19 anything of value with intent to influence any
20 official act, shall be fined or imprisoned.

21 And, again, I don't describe the penalties
22 at this time.

23 The same Section defines public official
24 as including an employee of any Government Agency.
25 And it defines an official act as meaning any

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2 decision or act on any question which may be pend-
3 ing before any public official in his official
4 capacity. That means that you can find that Mr.
5 Cooley was a public official, and the money was
6 given with intent to influence his act on an
7 income tax return, which would be an official act.

8 With respect to the substantive offense,
9 there are three elements.

10 First, the act or acts of directly or in-
11 directly giving a sum of money or a thing of value.

12 Second, doing it corruptly.

13 And Third, doing it with the intention to
14 influence some official act.

15 The word "corruptly" has this context.

16 And act is corruptly done if it's done voluntarily
17 and intentionally with the bad purpose of either
18 accomplishing an unlawful end, or achieving an
19 lawful end by someone with unlawful means.

20 In other words, when you are trying to
21 influence an official act, it doesn't matter if
22 you are trying to influence an official to do
23 something he should do. You can't give him money
24 in order to influence his act.

(continued on next page.)

JB/LH 1
2PM (3)

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Charge

2 The burden is always on the prosecution
3 to prove beyond a reasonable doubt every essential
4 element of the crime. And you can't infer
5 from the fact that one element has been proved
6 that the other element also exists. You must
7 find with respect to each of those elements.

8 Now, you don't have to find whether the
9 Argo Service Corporation owed more taxes or not.
10 That is one of the issues that was being
11 debated between Mr. Cooley and Mr. Baron. That
12 will be determined in another agency or court
13 if it has to be determined after this case is
14 over. But the purpose of the statute is to
15 protect the integrity of official agents by
16 forbidding any payments that are made with the
17 intention to influence the agent, whether the
18 agent is good or bad or desirable or undesirable.

19 Now, I come to the defense of entrapment,
20 which is used by the two Vowterras defendants who
21 say, "Even if we gave the money it was not our
22 fault that we gave it. At any rate, we are not
23 liable for giving it."

24 I will tell you what the rules of law are.

25 When a defendant asserts that he is a

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Charge

victim of entrapment, it's a legal term that has a technical meaning in criminal cases. The idea is if a criminal design originated with the official of the Government and they implant the disposition to commit the offense in the mind of an innocent person, and they induce the commission of the crime in order that they may prosecute, then the accused is a victim of entrapment. And the law as a matter of policy forbids conviction in such a case.

The function of law enforcement is both to prevent crime and to apprehend criminals. It doesn't include the manufacture of crime in order to prosecute innocent people. But some criminal activity is such that stealth and strategy are necessary weapons in the arsenal of law enforcement. The use of tape recordings is a proper and necessary method of law enforcement, even when the defendant does not know that they are being used, and whether or not you approve of such use is not a factor in your decision.

If a person already has the willingness and readiness to break the law, the mere fact that Government Agents provide what appears to be a

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Charge

favorable opportunity or facility for the commission of the offense doesn't constitute entrapment. The mere fact that there is deceit by Government Agents doesn't defeat a prosecution, for there are circumstances when the use of deceit may be the only practical law enforcement technique available.

Certain crimes have a common feature which require the use of means of detection like tape recordings, particularly crimes that are committed privately with a willing participant such as the giver or the recipient of a bribe who may not complain and who makes normal detection very difficult, and might make a court case dependent on an exchange comparison of sworn testimony without the benefit of a simultaneously recording of what took place.

The question of entrapment involves two issues and you should consider it in two stages. The first issue for you to consider is whether the defendants were induced to commit the crime by anyone acting for the Government.

You must first ask whether Agent Cooley initiated the criminal transaction in the case

Charge

1 4
2 or whether he merely provided a favorable
3 opportunity for the commission of the crime.

4 In connection with inducement, keep in
5 mind it is not necessary that any particular
6 words or language or symbols be used. Inducement
7 of a bribe offer by Mr. Cooley might be accomplished
8 by indirection or by suggestion.

9 You need consider the state of mind of
10 Nicholas Vowteras and Nestor Vowteras. If they
11 could reasonably interpret Cooley's words or
12 conduct as the solicitation of a bribe, then you
13 may find that the first element of the defense
14 of entrapment is established. And then the
15 Government must prove the second element, the
16 previous disposition to offer a bribe.

17 On the first point, there must be some
18 evidence that Agent Cooley initiated the illegal
19 conduct as opposed to merely providing the
20 defendant with a timely or convenient opening
21 for it. If you don't find such inducement, then
22 there is no entrapment and the defense is out.

23 If you do find that there is some evidence
24 that the Government induced the criminal trans-
25 action, then you must consider the second issue:

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Charge

Did the Government prove beyond a reasonable doubt that the inducement was not the cause of the crime, but rather that the defendant was ready and willing to commit the crime.

A citizen is not free to give a bribe everytime somebody asks for one. I am not going to pass on the policeman case that was described as a hypothetical because you are considering this particular bribe and in this particular case and whether this was entrapment.

The defense of entrapment is not simply that the Government induced the transaction. It is the policy that law enforcement officers can't prosecute a crime by leading innocent persons into committing a crime. And the policy creates a distinction between the unwary innocent person and the unwary criminal.

So if you find that AGent Cooley induced the criminal transaction, there can nevertheless be no entrapment after the Government proves beyond a reasonable doubt that Nicholas Vowteras and Nestor Vowteras were ready and willing to seize on the opportunity afforded by the Government to commit the crime.

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Charge

There are three ways in which the Government can show that the defendants were ready and willing. One is proof that they had acted in an existing course of criminal conduct similar to the crime for which they are charged. There is no requirement that this prior conduct be formally the same as the crime charged.

Commercial bribery is different from the bribery of an official. And the fact that some of the payments that are alleged to have been made out of these cash checks were commercial bribery doesn't prove that these defendants were willing to commit a more serious crime of bribery of a public official. But you can weigh the fact that there were secret payments made to employees of customers to determine what bearing it has on the willingness of the defendant in this case to make secret payments to Mr. Cooley.

A second way to show a disposition to commit the crime is to show that the defendants already had a design to commit the crime for which they are charged in this case. And if you believe what Mr. Cooley said with respect to the

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Charge

events of October 11th, you might be able to find that that indicated a prior disposition to offer a bribe.

A third method of proof of a disposition to commit a crime is for the Government to show the defendant's willingness to commit the crime for which they are charged. And this can be evidenced by the readiness of their response to the inducement.

How much persuasion did they need? Was it really something that they were trapped into or something that they were ready to walk into.

You can consider all these ways insofar as they bear on the defendants being ready and willing to commit the crimes charged in the indictment.

The defense of entrapment is not created for the purpose of being ~~generally~~ to defendants. It is for the purpose of seeing to it that law enforcement officers observe the standards that courts have laid down for their conduct in the case that creates this entrapment defense.

Now, I come to the evaluation of evidence.

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Charge

Generally speaking, there are two types of evidence that a jury can consider in finding the truth as to the facts of a case. One is direct evidence, such as the testimony of an eye witness. The other is indirect or circumstantial evidence, which is the proof of a chain of circumstances that point to the existence or non-existence of certain facts.

With respect to state of mind, there is direct testimony by Mr. Cooley. With respect to Mr. Baron's statement, there is direct contradictory testimony by Mr. Baron that he had no idea of giving a bribe.

With respect to circumstantial evidence, there are areas where there are real disputes as to what circumstantial evidence means. Mr. Baron says the fact that an agent would not mention a problem area is circumstantial evidence to prove that he was right and not Mr. Cooley with respect to the conversation at the luncheon on October 11th. A different inference that you might draw would be that Mr. Baron had looked at the previous audit and knew what the problem areas were, that he realized during the morning

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of October 11th that he was not dealing with a stupid agent, that he had an agent that was looking for documents, and that they couldn't rely on the agent being blind and not knowing what the problem areas were.

You are not restricted to drawing an inference which leads to guilt or an inference which leads to innocence, provided on the whole case you are satisfied with guilt beyond a reasonable doubt.

Circumstantial evidence may be enough to convict if you find a defendant's guilt beyond a reasonable doubt on the whole case.

When you are analyzing the evidence you can draw an inference based on your own common sense from any facts you find proved. You don't have to discard your common sense when you go into the jury room. ~~You are not confined to the~~ bare bones of the testimony or the exhibits, but you can draw only reasonable inferences. You can't base a verdict on conjecture or suspicion.

Now I come to another difficult aspect of your duty, determining the credibility of witnesses. It is the theory of American Justice

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Charge

that twelve citizens selected as a cross-section of the community and screened to eliminate prejudice or bias as far as possible can best determine the truth of a charge.

When you weigh the testimony of witnesses, you can consider their relationship to the Government, their bias or interest in the outcome of the case, their manner while they testified, their frankness, their intelligence as you have observed it. Judging testimony is not much different from what goes on in real life. People frequently tell you things that are intended to influence decision on your part and you have to consider whether the people you deal with had the capacity and the opportunity to observe, to remember the things that they say, whether they had any bias or prejudice, whether they are the kind of people whose statements you would accept. You can consider the inherent believability of what a witness says, whether it accords with your own knowledge or experience.

Of course, you also can consider it's an important matter, the extent to which any testimony has been confirmed or contradicted by

1 other credible evidence, or inconsistencies
2 within the testimony of a witness on direct
3 examination or cross-examination or by a change
4 of testimony at different times.
5

6 If a witness has made a mistake or lied,
7 you can say you won't believe anything he testified.
8 to. Or you can say part of what he said may
9 be true and you accept that part and reject the
10 rest.

11 A witness may have been mistaken or un-
12 truthful with respect to part of his testimony
13 and correct with respect to other parts. When
14 it comes to inconsistencies within a witness'
15 testimony, you can consider the importance of
16 the discrepancy or the inconsistency. You can
17 think of your own experience and consider how
18 precisely the same story is told if you tell it
19 twice or if two different people who were there
20 tell it to you. Use that in judging the fact
21 of inconsistencies.

22 Now, there are some inconsistencies with
23 respect to Agent Cooley. There was reference to
24 a contradiction between what he said in court
25 and what he said in the Grand Jury. My recollection

1
2 is that he told the Grand Jury he didn't think
3 that the defendants knew he had a tape recorder.
4 What he said on the stand here was he didn't
5 know whether they knew he had a tape recorder.
6 But to the extent there are inconsistencies, you
7 can consider that as bearing on his credibility.

8 And similarly with respect to statements by
9 Nicholas Vowterras or Mr. Baron, whether there were
10 any inconsistencies, you can determine how
11 material they were and what weight to give to
12 them in determining the credibility of other
13 testimony.

14 With respect to Government Agents, I think
15 I said at the beginning you are not to give any
16 greater weight or credibility to the testimony
17 of a witness solely because of the fact that he
18 is a Government Agent. And you are not to give
19 it any less weight. His testimony should be
20 evaluated in the same manner as you would evaluate
21 the testimony of other witnesses.

22 Now, I have mentioned that you can consider
23 the deep, personal interest that a defendant has
24 in the result of the case. There is a rule that
25 applies if you find that Mr. Baron made a

1
2 false explanation when he was arrested. Exculpatory
3 statements made by a defendant when shown to be
4 false may be considered by the jury as evidence
5 of a consciousness of guilt.

6 But I think you can also consider, as
7 counsel mentioned, that this was at the time of
8 the arrest at 6:30 A.M. and he may not have had
9 all his wits about him at the time.

10 Now, there are conspiracy counts and
11 substantive counts. If evidence relates to both
12 a conspiracy count and substantive count, there
13 is nothing inconsistent in using the same evidence
14 to prove that a particular party committed a
15 substantive crime and also that he was a member
16 of the conspiracy.

17 (continued on next page)
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2 A word about the transcript. It's largely
3 repetitious. The real evidence are the words you
4 heard from the tapes. Although the parties have
5 agreed that the transcripts are substantially
6 accurate, you can determine the accuracy for
7 yourselves. If you find you have heard words or
8 language that wasn't transcribed, you can consider
9 them. If you didn't hear words or language that
10 was transcribed, you are free to disregard that.

11 And, of course, you can always consider
12 the testimony of the witnesses who were actually
13 present as to the actual words and as to the
14 meaning of the words and you give that testimony
15 such weight as you determine.

16 There's been testimony here of the
17 previous good character of some of the defendants.

18 You may consider such evidence of good
19 character, together with all the other facts
20 and all the other evidence in the case in
21 determining the guilt or innocence of a
22 defendant.

23 Evidence of good character may, in itself,
24 create a reasonable doubt where, without such
25 evidence, no reasonable doubt would have existed

Charge

1
2 because it may be unlikely that someone of
3 good character would have offered a bribe.

4 But if, on all the evidence, you are satisfied
5 beyond a reasonable doubt that a defendant is
6 guilty, the offense is not excused by showing
7 he previously enjoyed a reputation of good
8 character, and you shouldn't acquit him just
9 because he was of good repute up to now, if
10 you are satisfied that he committed a crime.

11 I told you at the beginning and I repeat
12 now, that you are not to be influenced by the
13 fact that there were objections to any question
14 or that some items of evidence were excluded.

15 My decision with respect to motions or
16 rulings on evidence are not to be taken as an
17 indication of guilt or innocence of a defendant.
18 I determine those merely on questions of law and
19 evidence, and I express no opinion as to the
20 guilt or innocence of a defendant.

21 Now, a Federal Judge is permitted to
22 comment on the evidence as long as he does not
23 usurp the function of the jury.

24 But you heard long comments today and
25 so I am not going to try to review all the

Charge

evidence.

There is one rule of law that I did not give you that applies as to the evidence.

With respect to aiding and abetting, which involves, as I mentioned, the question whether Mr. Baron knew that there was \$500 or something beyond liquor in the bottle that he brought back and put on the floor, the rule is that a person can't close his eyes to things that he ought to know. And you can determine whether it was a coincidence that he went to the men's room just when Mr. Vowteras was putting the money in the bottle, if he did put it in there, or whether he went away because he knew what was going on, but he wanted to stay as far apart from it as he could.

We have the tapes which are pretty complete. But I think one of the important issues for you to consider is the credibility of the testimony concerning the October 11th conversations.

If you believe Mr. Cooley's testimony, then you will have an easier time in finding that there was a predisposition to offer a bribe,

Charge

and even that Mr. Baron was making himself part of it.

If you don't believe Mr. Cooley's version of the October 11th conversation, you still may be able to find that the Government has proved the absence of entrapment beyond a reasonable doubt, depending on the interpretation that you may give to the tapes and the events and the testimony that was there.

There was a statement in summation by Mr. Lewis. I think it was, there is a special morality for businessmen.

As a matter of law, there is no rule that the bribery statute is interpreted different for businessmen from what it is for private citizens.

The commercial bribery statute of New York, Section 180.00 of the Penal Law says, that a person is guilty of commercial bribery when he offers or confers to offer any benefits upon an employee, agent or fiduciary, without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's

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2 affairs.

3 This is only a misdemeanor in New York,
4 a minor misdemeanor.

5 You will note that intent is a factor in
6 that statute. And you may consider the testimony
7 that many of the so-called commission payments
8 were really tips to workmen for helping unload
9 or install air compressors in determining what
10 bearing that has on the pre-disposition of the
11 defendants to offer a bribe if they were induced
12 to do so.

13 Now, let's see if there are more things
14 I left out.

15 Yes. It comes after I talk about the
16 commercial bribery statute.

17 The defendants are not on trial for
18 any act or conduct that is not alleged in the
19 indictment. You must consider the evidence
20 solely with respect to the specific charge of
21 bribery and conspiracy, and render your verdict
22 based solely on such charges.

23 Now, whatever I have said about the
24 evidence is only a reference to part of it, and
25 my recollection of it. If I have made any

Charge

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2 mistake in describing the facts, that doesn't
3 control your recollection any more than the
4 statements of counsel. Your recollection of the
5 facts governs. They are your province.

6 There was reference by Mr. Bergman in
7 his summation to Mr. Baron's motive to avoid
8 the revelation of some falsity of the income
9 tax returns. That is not really in the case.
10 I don't think there was testimony with respect
11 to falsity of the return. It may well have been
12 that Mr. Baron might have feared being subject
13 to some criticism if it turned out that there were
14 no documents to substantiate the deductions that
15 he placed in the return and that may have
16 affected his state of mind. But don't consider
17 that he is guilty of any violation of the income
18 tax law as a reason for reaching your verdict.

19 There was a statement by Mr. Bergman that
20 you could infer that the \$10,000 which Mr.
21 Nicholas Vowteras drew out from his savings
22 account was used to pay a fee to the Stolars.
23 You can put dates together and draw that
24 inference. But there is no testimony of that
25 fact. And you may bear in mind that the visits

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Charge

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from the Stolars was apparently before December

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21st and the withdrawal was on December 27th.

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And you can determine whether you are going to

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accept Mr. Nicholaw Vowteras' statement that he

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used that for household purposes, wedding gifts,

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Christmas, etcetera.

8

Now, with respect to reaching a verdict,

9

and I am almost at the end -- when you go into

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the jury room and discuss the facts, your ultimate

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verdict must be unanimous on each count as to

12

each defendant. You all have to agree.

13

I suggest you discuss the evidence rather

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fully before you take even a tentative vote so

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you don't form factions, so someone doesn't

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jump to a hasty conclusion before everything is

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considered.

18

Do you want some of the testimony repeated,

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or if you want to see the exhibits, you can give

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a note to the marshal who will be sitting outside

21

the room. We will try to find the place in the

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minutes and we will send in the exhibits.

23

Mrs. Barrett will be your forelady. She

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should see to it that everybody gets a chance

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to talk and that no more than ~~one~~ person talks

Charge

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2 at a time as far as it is possible. And that's
3 all the power she has. She can influence the
4 time when you take a ballot. But her vote
5 counts no more than anyone elses. She has no
6 other power.

7 During your deliberations you are the
8 judges of the facts. You are not partisans
9 or advocates. In judging the facts impartially,
10 you are making a high contribution to the
11 administration of justice.

12 You have three defendants here, four
13 counts, and only two defendants on the fourth
14 count. You must try to reach a verdict on each
15 of those counts. And I will provide a form of
16 the verdict so that you can write it down.

17 When you have reached your verdict, Miss.
18 Barrett will give a note to the marshal saying
19 you have reached a verdict, not saying what it
20 is. Then you will be brought in here and she
21 will announce it orally. And either party can
22 ask to poll the jury, which means that each
23 juror is asked whether he agrees with the verdict
24 so that we are sure it's a unanimous verdict.

25 Again, in determining guilt or innocence,

1
2 don't give any consideration to the matters of
3 punishment, because that is exclusively my
4 responsibility if there is a guilty verdict.

5 You are each entitled to your own opinion,
6 but you should each exchange views with your
7 fellow jurors and listen carefully to each other.

8 And, as I say, the verdict should be
9 unanimous. But it is not necessary for a juror
10 to change his opinion merely because of the
11 majority of the jurors have an opinion contrary
12 and he wants to be in a hurry to get away.

13 Still, you don't hesitate to change
14 your opinion if you are convinced that your
15 original opinion wasn't based on a full and com-
16 plete understanding of the record.

17 I don't know how long it will take for
18 you to give the matter the conscientious consideration
19 you all think necessary. We have been over a
20 week and we are at 4:15 now.

21 I think I will suggest that you stay until
22 5:30 anyway, and see what you can do and then
23 determine whether you want to come back or whether
24 you want to stay late.

25 Well, you can decide it by majority vote.

Charge

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But I hope you won't have any real problem on
it.

(continued on the next page.)

2 Now, I have given you 40 minutes or so
3 of instructions. I may not have done it without
4 some mistake, which I hope is minor. Counsel
5 has a right to tell me without your hearing it
6 what I may have said that is wrong. And if
7 there is going to be additions or changes, I
8 will call you in in just a few minutes. You
9 can begin your deliberating, particularly to
10 determine whether you want any exhibits before
11 you go into the jury room or as soon as you go
12 into the jury room.

13 Now, Miss Behrman, you were almost called
14 this morning, and you, Mr. Romano, you sat here
15 patiently on the whole thing. But twelve jurors
16 have to decide it. And we have not needed
17 alternates as rapidly as we have in other cases.
18 So you are excused.

19 Mr. ~~Jarkas~~ will give you your cards. You
20 go back to the jury room and get your things while
21 I am having the Marshals sworn in. Come forward,
22 please. Thank you for being here because it's
23 frequently necessary.

24 Goodnight. You better take your cards
25 down to the jury room. You have finished your

time so I don't think they will want you for anything else.

(Whereupon, the two alternates were excused.)

THE COURT: Now, will the Marshal please step forward and be sworn.

(Whereupon, a Deputy United States Marshal was sworn by the Clerk of the Court.)

THE COURT: All right, will you take the jurors into the jury room, please. And here is a formal verdict which you can give to the foreman. I see it's ready and I will give copies to counsel who will look at it.

(Whereupon the jury retired from the courtroom.)

MR. WASHOR: Judge Judd --

THE COURT: First, Mr. Bergman, are there any exceptions?

MR. BERGMAN: Yes, your Honor. I know it doesn't do much good for Appellate purposes, but in any event, I think toward about the last quarter of the charge you mention that in the context of a -- what I seem to recall to be aiding abetting statute, that Baron's testimony as to

1
2 his version of how the \$500 got into the
3 carton, without at the same time telling the
4 jury that there was other evidence in the case,
5 to whit, the tapes.

6 THE COURT: You had -- no. You had
7 mentioned it.

8 MR. BERGMAN: Well, I know I had mentioned
9 it. And I felt that perhaps the jury got the
10 feeling that the Judge was endorsing one version
11 as opposed to the other.

12 THE COURT: No, I didn't mean that. If I
13 have other things to correct, I will mention it.
14 I didn't include the usual words. I guess I
15 have not covered all the evidence because I
16 thought it was quite obvious.

17 All right. Mr. Bergman.

18 MR. BERGMAN: One more thing, your Honor.
19 I would request that you charge the jury with
20 request to prior consistent statements in the
21 case of Cooley, if you deem it advisable.

22 THE COURT: You didn't ask that before.
23 I might properly have done so. I'll let these
24 in as prior consistencies if the defendant's
25 want that. I will give it to them --

1
2 MR. WASHOR: No.

3 THE COURT: Because I suppose they are
4 entitled to -- I am entitled to tell the jury
5 what the testimony -- that it only disproves
6 recent fabrication or impeachment of credibility.

7 I will hear -- is that all? I will hear
8 Mr. Washor.

9 MR. WASHOR: Just two objections to the
10 general charge regarding aiding and abetting and
11 acting in concert. And I take exception to the
12 example given by the Court in reference to the
13 inference or type of inference that can be
14 drawn.

15 Last but not least --

16 THE COURT: What is the --

17 MR. WASHOR: I believe the Court alluded
18 to an inference that could be drawn as to the
19 believability and the credibility of statements
20 made by Cooley and/or Baron relative to October 11th,
21 1972.

22 THE COURT: Well, I was discussing
23 inferences. I thought it was a proper --

24 MR. WASHOR: Your Honor, I don't expect
25 you to answer me.

1
2 THE COURT: I take all these exceptions
3 seriously.

4 MR. WASHOR: I take exception to the Court's
5 charge with reference to the fact that an
6 individual cannot close his eyes to a crime.

7 THE COURT: That I have given many times
8 and the support for it is in the Court of Appeals
9 decisions.

10 MR. WASHOR: No other objections. May I
11 just be excused, please.

12 THE COURT: Yes.

13 MR. WASHOR: Thank you.

14 THE COURT: May I have your stipulation
15 before you go. I guess you will be back.

16 MR. WASHOR: Yes. You mean so far as -

17 THE COURT: If there is a request for the
18 exhibits, that they may be sent in without
19 reassembling.

20 MR. WASHOR: Absolutely. I just want to
21 be notified when that occurs.

22 THE COURT: Yes.

23 MR. LEWIS: I join in the motions stated
24 by Mr. Washor.

25 And one other thing. I did request your

1
2 Honor to instruct the jury that the tax assertion
3 of \$100,000 -- that the evidence was based on a
4 hypothetical.

5 THE COURT: I will bring them back and
6 tell them that.

7 MR. LEWIS: I'd appreciate it.

8 THE COURT: I thought I had written it down.

9 MR. BERGMAN: The form of verdict and I
10 suppose the charge went along with the -- the
11 charge doesn't seem to follow the indictment in
12 the sense that the indictment charges, as I
13 recall, that the bribes were paid. Well, the
14 indictment charges the bribes plus the offer
15 and the promises that were made in connection
16 with the bribes over a period of time.

17 THE COURT: Counts 2 and 3 relate to
18 promises made on October 11th.

19 MR. BERGMAN: From October 11th to the 27th.

20 THE COURT: Well, I will cover that.

21 MR. BERGMAN: As well as the -- the fourth
22 count relates again from October 11th up to the 27th,
23 offers, promises and bribes.

24 THE COURT: All right. Well, the form of
25 verdict is not intended to include the entire

1
2 count.

3 Anything else? I will bring them in and
4 talk to them.

5 MR. LEWIS: No, your Honor.

6 THE COURT: All right, bring them in.

7 (Whereupon, the jury entered the courtroom.)

8 THE COURT: Miss Barrett, ladies and gentlemen,
9 there are three things that I said I would add
10 or modify in my charge. I didn't include the
11 statements that I usually do and maybe it wasn't
12 specific that in mentioning some evidence either
13 as illustrations of substantive law application
14 or circumstantial evidence. I don't mean that
15 that is all the evidence you can consider. You
16 can consider everything that counsel mentions in
17 their summation and everything that you remember
18 that they did not cover in their summation.

19 (continued on next page)
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JB:GA 1
T2R6 PM 2

Charge of the Court

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In my ~~form of verdict~~, I referred to bribes on December 21st and December 27, 1972. The offer, as well as the giving, is forbidden by law. And the indictment refers to an offer and giving between October 11th and December 21st. I am not sure that that has any importance. But the summary in the form of verdict is not a complete analysis of the indictment.

And I was going to comment on Mr. Bergman's statement that there was \$100,000 of tax involved. I think that was a hypothetical question as to what might be involved if all the Commissions and T & E were disallowed and a maximum constructive dividend charged. We don't know what other changes might be made in the return, or how much might have been, or what might have been the effect of the ultimate determination of what the parties would allow under Cooley's theory. So bear in mind that the \$100,000 is just a hypothetical figure.

And I left off the final paragraph of my usual Charge. Referring to your Oath at the beginning, without fear or favor to any man, you will well and truly try issues between the parties according to the evidence given to you in court and

2 according to the laws of the United States.

3 You may now return and go ahead.

4 (Whereupon, the jury retired from the
5 courtroom.)

6 (Recess taken.)

7 THE COURT: The jurors have asked for
8 coffee and tea. So they will be here for a
9 little while.

10 (Recess taken.)

11

12 (continued on next page.)

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NOTICE OF MOTION PURSUANT TO RULE 33 OF THE F.R.C.P.
AND TITLE 18 U.S.C. 4244 AND AFFIDAVIT IN SUPPORT
THEREOF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA	:	MOTION PURSUANT TO
	:	RULE 33 F. R. Cr. P.
v.	:	<u>AND TITLE 18 U. S. C. §4244</u>
NICHOLAS VOWTERAS and	:	73 Cr. 583
NESTOR VOWTERAS	:	
	:	
Defendants.	:	

-----X

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affirmation of ROBERT ARON FRIED, dated the 20th day of February, 1974, the annexed affirmation of JACOB P. LEFKOWITZ, dated the 25th day of February, 1974, the annexed affirmation of Benjamin Lewis, Esq. dated the 21st day of February, 1973, the annexed affidavit of Dr. Hyman G. Weitzen dated the 25th day of February, 1974, and the annexed affidavit of Dr. Ferris dated the 21st day of February, 1974, and all of the proceedings had herein, the undersigned, on behalf of defendant Nestor Vowteras, will move this Court before the Honorable Orrin G. Judd, at 10:00 o'clock in the forenoon on the ^{MARCH} 15th day of ~~February~~, in Courtroom #11 of the United States Courthouse, 225 Cadman Plaza East, Brooklyn, NY for the following:

1. For a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the ground of newly discovered evidence of which both the Court and defense counsel were ignorant at the time of the trial and preliminary proceedings herein and which could not have been sooner discovered in the exercise of due diligence. The said evidence is not merely cumulative or impeaching in character but is material and of such character that

the defendant was, in fact, substantially prejudiced and deprived of a fair trial; that if such evidence was known at the time of trial it would probably have resulted in a different verdict, all of which more fully appears from the affirmations, affidavits and exhibits attached hereto.

II. On behalf of the defendant, counsel respectfully requests, pursuant to Title 18, United States Code §4244, and Westbrook v. Arizona, 384 U. S. 150 (1966), that the court conduct a hearing and/or cause the defendant to be examined, as to his mental condition to determine whether the defendant was competent to stand trial and/or whether defendant was competent to waive his Constitutional right of effective assistance of counsel and to proceed, as he did, without separate counsel under the circumstances herein, as more fully appears from the affirmations; affidavits and exhibits attached hereto.

Dated: New York, New York
February 21, 1974

JACOB P. LEFKOWITZ
Attorney for Defendant
Nestor Vowteras
150 Broadway
New York, New York 10038

TO: CLERK OF ABOVE COURT
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK

HON. EDWARD BOYD V
U. S. ATTORNEY FOR THE
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:	
	:	<u>AFFIRMATION</u>
v.	:	73 Cr. 583
NICHOLAS VOWTERAS and	:	
NESTOR VOWTERAS,	:	
	:	
Defendants.	:	

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ROBERT ARON FRIED, an attorney duly admitted to practice before this Honorable Court hereby affirms the following to be true under the penalties of perjury:

1. I am associated with JACOB P. LEFKOWITZ, attorney for Nestor Vowteras and am familiar with the facts in the above-entitled action and I make this affirmation in support of the motions enumerated in the attached notice of motion.
2. The defendant was charged with conspiracy to violate Title 18, United States Code §201(b) in violation of Title 18, United States Code § 371 and three counts of violation of Title 18, United States Code §201(b) and 2.
3. On November 27, 1973 prior to trial, this Court held an in camera hearing pursuant to United States v. DeBerry, 487 F. 2d 448 (2nd Cir. 1973) in order to inquire into the propriety of one attorney representing both Nicholas Vowteras and Nestor Vowteras in light of the clear and obvious conflict of interest involved (TR 1B-15B, 1D-10D). After discussing this matter with Nestor Vowteras, Nicholas Vowteras and Benjamin Lewis, Esq. the following colloquy ensued, as the Court aware of the seriousness of this conflict of interest stated:

THE COURT: ... I am inclined to say you should both have a little more time to consider this. It is my judgment that maybe there is a conflict of interest. Maybe Mr. Nestor has the most at stake, because his brother's testimony....

MR. NICHOLAS VOWTERAS: We are in it together.

MR. NESTOR VOWTERAS: Why don't we take a little more time? Maybe we are on the wrong track. Maybe we are not thinking right.

THE COURT: Let Mr. Nestor come back at 2:30 and tell me whether he has any misgivings. (TR 13B).

And then indicated that Nestor Vowteras come back after lunch at 2:20 and speak to him privately (TR 14B). At 2:20 p.m., Nestor Vowteras returned and apparently waived his right to separate counsel:

THE COURT: This is an in camera proceeding. Have you had time to think about the matter?

MR. NESTOR VOWTERAS: Yes, sir.

THE COURT: I pointed out this morning it might be possible that your brother's testimony would convince the jury that he was innocent, and that your not testifying might result in your being convicted. Have you decided if you want a separate lawyer?

MR. NESTOR VOWTERAS: Yes, I have decided. I have decided with Mr. Lewis.

THE COURT: You have a right to apply now to set a separate lawyer and to have an adjournment for that purpose. I want to be sure you're waiving that right.

MR. NESTOR VOWTERAS: I'm waiving that right, sir.

THE COURT: If you're convicted and if there is another lawyer who comes in to represent you and he argues that you should have had a separate lawyer, I want you to know, now is the time.

MR. NESTOR VOWTERAS: That's right. You mentioned it to me enough times.

THE COURT: You have had time enough to think about it?

MR. NESTOR VOWTERAS: Yes.

THE COURT: It's a serious matter.

MR. NESTOR VOWTERAS: Yes, I know how serious it is.

THE COURT: I can appreciate your feelings. You have a right to choose your own lawyer. I can't tell you to select somebody else. All I can tell you is you run a risk by keeping the same lawyer. Are you clear in your mind that you want Mr. Lewis to represent both you and your brother?

MR. NESTOR VOWTERAS: Yes. (TR ID-2D)

4. The within cause came to be tried before the Honorable Orrin G. Judd and a jury on November 27, 1973 and resulted in a jury verdict on December 7, 1973 of guilty on all counts with respect to Nestor Vowteras.

5. Since the completion of said trial and on or about January 10, 1974, after being retained by Nicholas Vowteras to handle the appeal in the above case, Jacob P. Lefkowitz, Esq. discovered for the first time certain facts hereinafter set forth, which Benjamin Lewis, Esq. trial counsel for Nestor Vowteras did not and could not discover before trial in the exercise of due diligence for the reasons that are set forth in the attached affirmation of Benjamin Lewis, Esq. (see attached affirmation of Benjamin Lewis, Esq.)

6. The said evidence is not cumulative or impeaching in nature, in that no evidence of the said facts was produced prior to or upon the trial

by either counsel for the defendant or counsel for the United States. The said evidence is of such a nature and so material that it would probably produce:

- i) a determination that defendant was not competent to stand trial and/or
- ii) defendant did not competently waive the right to effective assistance of counsel in the DeBarry hearing that took place prior to trial or
- iii) a different verdict had the jury been made aware of the mental and emotional condition of the defendant under the circumstances of the acts charged herein for the reason that: due to the nature of the offense charged and of the entrapment defense relied upon by trial counsel, had the jury been aware of defendant's mental and emotional state, it is likely that the jurors herein would have found not only Nestor Vowteras but also Nicholas Vowteras not guilty on all counts. (See POINT TWO in the accompanying memorandum of law.)

7. The new evidence herein referred to is set forth at length in the affirmations and affidavits of Jacob P. Lefkowitz, Esq., Dr. Weitzen, and Dr. Ferris, attached to this motion.

8. This new evidence is also the basis for the motion pursuant to Title 18, United States Code §4244 requesting that the court conduct a hearing and/or cause the defendant to be examined as to his mental condition.

9. Legal support for the various motions herein is set forth in the accompanying memorandum of law.

WHEREFORE, affirmant respectfully requests that this court enter an order granting, in full, the relief requested.

Dated: New York, New York
February 20th, 1974

ROBERT ARON FRIED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA,

-against-

NICHOLAS VOWTERAS and
NESTOR VOWTERAS,

Defendants.
-----x

AFFIRMATION

73 Cr. 583

JACOB P. LEFKOWITZ, an attorney duly admitted to practice
before this Honorable Court hereby affirms the following to be true under
the penalties of perjury:

That I am the attorney for Nestor Vowteras in the above-entitled
action and make this affirmation to show that the evidence upon which this
motion is based is, in fact, newly discovered.

When I was retained by Nicholas Vowteras to handle the appeal in
the above case, an appointment had been made for me to meet Nestor Vowteras
that evening. In the interim, I read the minutes of the proceedings that took
place in camera before U. S. District Judge Orrin G. Judd, the trial justice,
and Nestor Vowteras. I was rather amazed at one of the answers that he
gave to the judge when his Honor said "If you're convicted and if there is
another lawyer who comes in to represent you and he argues that you should
have had a separate lawyer, I want you to know, now is the time." Nestor
Vowteras replied "That's right. You mentioned it to me enough times."
The answer struck me as impertinent and irrational, and not congruous with

what I had been told about him by his brother as an astute businessman. When I met him that night at his premises, I saw that he was busily engaged at a front desk in the office of Argo Compressor Corporation. About fifteen minutes later, when he was called into the private office by his brother Nicholas and introduced to me, he impressed me with his business-like attitude and told me how many hours he had been working and in all respects, appeared to be the part; namely that of a busy, competent businessman.

Patiently and doggedly, I led the conversation to his questions and answers by U. S. District Court Judge Judd and himself prior to the trial before lunch, and the same day when he returned after lunch and prior to the commencement of the trial. His answers and reactions were just as pungent and irrational. When I pressed him on the irrationality and tried to tie that up with his need to see Dr. Hyman G. Weitzen his psychiatrist whom he had been seeing for many years, his response was "I only see Dr. Weitzen when I'm depressed. All I do is talk and he listens and because I have confidence in him, I feel better." In response to my inquiry if that's all Dr. Weitzen does for him, the answer was yes. When I pressed him further as to his disrespectful answer to the Judge, as to getting a separate lawyer, he said "Oh that, I don't know whether I knew what I was doing." He told me that when he eats sweets of any kind, he has a tendency to not know what he is doing or saying and sometimes blacks out completely and that he had been seeing Dr. Ferris, who had been treating him and who could vouch for the correctness of what he was telling me.

I questioned him "Did you consult with anyone after the Judge told you to do so and after he informed you that you ought to get a separate

lawyer?" His reply was "I went outside and I told my brother and Lewis, his lawyer what the Judge said" and Lewis told him that he would have to make the decision and his reply was that he will stay with Lewis. There was no consultation, he did not question anyone else and he was so upset that he did not go to lunch with his brother and Lewis but went by himself to the cafeteria in the Internal Revenue Service building basement where he had some sweet cake and coffee, with sugar.

I subsequently spoke to Dr. Ferris who told me that he had been treating Nestor Vowteras and that his so-called black out which he attributes to eating sweets is a figment of his imagination. Dr. Ferris then informed me that this matter of eating sweets is only a small visible symptom of a far greater problem and that Nestor puts the blame on eating sweets when it is in fact indeed due to his emotional state of manic depression. (see affidavit attached of Dr. Ferris). I then spoke to Mr. Benjamin Lewis, his attorney who tried the case and asked him if he was aware of the incompetent state of Nestor Vowteras. His reply was that based on his operation of a substantial business employing 40 people, he could not believe him to be irrational or incompetent. He then stated, that while Nestor appeared to him to be somewhat eccentric and naive, he was an astute and capable businessman, with a warm relationship with his brother Nicholas and his family; that if Nestor was, indeed, incompetent he was unaware of it either prior to or at the time of the trial. I then asked him if he was aware that Nestor had been seeing a psychiatrist, Dr. Weitzen. He said, that he had, in fact, met with Dr. Weitzen but nothing developed from that meeting (see affirmation attached of Benjamin Lewis, Esq.).

As a result of the above information, I then spoke to Dr. Hyman G. Weitzen concerning Nestor's condition and was informed that, yes, he had been treating Nestor for a number of years due to his chronic and severe depression. I then asked him if it was possible that Nestor could be at times irrational or out of touch with reality; that is, at times, to be incompetent to make important decisions. His reply was yes, that Nestor when in a severely depressed state and faced with a serious problem concerning unfamiliar stresses would be capable, in fact, likely to make an irrational or inconsistent decision entirely out of touch with objective reality in order to avoid an unpleasant situation and resolve the problem as quickly as possible (see attached affidavit of Dr. Hyman G. Weitzen). I then asked him if he recalled a meeting with Benjamin Lewis, Nestor Vowteras' lawyer, concerning Nestor's condition. His reply was no, I don't recall the meeting and further, if such meeting had occurred he didn't keep notes or records which would enable him to recall the substance of that meeting.

The information above contained, and that detailed in the affirmation of Benjamin Lewis, Esq., and the affidavits of Drs. Ferris and Weitzen, was all discovered by my investigation subsequent to the trial of this action, and is the factual basis for the present motion. It is newly discovered evidence that raises a substantial question of whether Nestor Vowteras, under the circumstances, was competent either to stand trial and/or waive his right to separate counsel as is required by due process.

Dated: New York, New York
February 25, 1974

JACOB P. LEFKOWITZ

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA

-against-

AFFIRMATION

NICHOLAS VOWTERAS and
NESTOR VOWTERAS,

73 Cr. 583

Defendants.

-----x

BENJAMIN LEWIS, an attorney at law, duly admitted to practice in the United States District Court for the Eastern District of New York, hereby affirms the following to be true under the penalties of perjury:

I represented the defendants, Nestor Vowteras (Nestor) and Nicholas Vowteras (Nicholas), the defendants in the within cause that resulted in a jury verdict on December 7, 1973, of guilty on all counts in respect to Nestor and guilty to counts One and Four in respect to Nicholas.

I have read the within motion and hereby state that prior to and at the time of the trial I was ignorant of the facts, discovered subsequent to trial by Jacob P. Lefkowitz, Esq concerning Nestor's mental condition.

I was originally retained by Nicholas Vowteras to represent Nicholas and Nestor in the within action. When I first

met Nestor I found him to be a conscientious, hard worker, operating a substantial business employing forty (40) people. While Nestor, at times appeared to be somewhat "eccentric" and moody, I could not then have believed him to be irrational or incompetent based upon my observation of him primarily in the limited, familiar world of his business which he had operated, with his brother for over thirty years. He appeared to have a very warm, close relationship with his older brother Nicholas and in their personal relationship always consulted with his brother and relied on his advice.

During the course of our discussions, it came to my attention that Nestor had once had a gambling "problem" and at times he would become depressed and had, therefore, for a number of years, occasionally been seeing a psychiatrist, Dr. Hyman G. Weitzen of 55 East 80th Street. He stated that he only sees Dr. Weitzen when he becomes depressed and that he speaks to Dr. Weitzen which causes him to feel better. I then asked him if that was all, and he replied yes.

Subsequent to and as a result of this conversation, my partner, David L. Kitzes, Esq. and I made an appointment to meet with Dr. Weitzen. On June 15, 1973, we met with Dr. Weitzen and spoke with him about Nestor Vowteras. At this meeting, I found Dr. Weitzen to be extremely passive and non-communicative. He spoke very little except to confirm what Nestor had told me. That is, Nestor originally came to him about a compulsive gambling

over for the past 15 years; that Nestor comes and speaks to him and that because Nestor has confidence in him as a supportive figure, Nestor feels better. He did not volunteer any further information nor consult any records or notes.

As a result of the above, I had no further reason to investigate this area in greater detail. It is apparent, now, that Nestor was and is extremely reticent about discussing or even disclosing his problems; and in fact, seems at times to be unaware of the seriousness of his problems. That is, he appears to be completely unaware of those times, when in a state of severe depression, he acts quite irrationally and inconsistently.

On the date of the DeBerry hearing before this Court, on November 27, 1973, Nestor appeared to be very upset and unhappy, withdrawn and uncommunicative, with Nicholas doing most of the talking. However, I simply attributed this to the normal reaction of a man, inexperienced in the ways of the law, facing trial on a serious criminal charge.

After the ~~morning~~ part of the DeBerry hearing, I spoke only briefly with Nestor. He appeared extremely upset and distant. He restated what the Judge had said and I told him he would have to make the decision and his reply was that he would stay with me. He then stated that he wanted to be alone and withdrew to have lunch alone. I did not speak with Nestor again until after the DeBerry hearing and was not present when he purportedly waived his right to separate counsel.

Had I been aware of the facts concerning Nestor's mental condition my advice to him may have differed considerably concerning both the question of separate counsel and defense strategy.

Dated: New York, New York
February 21, 1974

BENJAMIN LEWIS, ESQ.
Attorney for Nicholas Vowteras

HYMAN G. WEITZEN, M.D., P.C.
55 EAST 80TH STREET
NEW YORK, NEW YORK 10021

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

HYMAN G. WEITZEN, M. D., being duly sworn, deposes and says:

I am a doctor of medicine, duly licensed by the State of New York and engaged in the practice of neuropsychiatry at 55 East 80th Street, New York, N. Y. I am a graduate of New York University College of Medicine, New York, in 1938, and began my private practice in neuropsychiatry in the City of New York in 1942. My hospital associations are:

1. Director of Neuropsychiatry at The French-Polyclinic Medical Center.
2. Associate Attending Physician at the Neurological Institute of N. Y.
3. Assistant Clinical Professor at Columbia College of Physicians and Surgeons.

I was consulted by Néstor Vowteras first in 1955 for the problem of gambling and the lavish spending of money that he was indulging in, in circumscribed periods. It soon became apparent that these "attacks" were truly depressive equivalent, occurring about the time he was basically depressed. During these periods his judgment, particularly concerning emotionally loaded content, was quite poor and he knew well enough to come to see me during these periods for emotional support and advice. My impression was that he was suffering from a recurrent depressive state and that often after a visit or two his mood would improve as did his judgment.

At times his mood of depression would last for longer periods of time, which would require more frequent and prolonged visits with me, at which time it became more apparent that during these states his judgment was faulty.

During such periods Nestor might plunge into betting with no thought given to the possibility of losing or realizing the consequences of such a loss. At these times there would be definite impairment of his value judgments, particularly in relationship to money.

Since Nestor Vowteras has been under my care, I have learned of the overwhelming influence his older brother, Nicholas Vowteras, has had over him. This was particularly true in the realm outside of business. Nestor has warm and close feelings for his brother and would not likely make a decision that would be, in his mind, a threat to their relationship. He always has had a neurotic fear of offending his brother and often made unreasonable concessions to him.

I have carefully read the transcript of the in camera proceedings before United States District Court Judge Orrin G. Judd, dated November 27, 1973, wherein Nestor Vowteras was asked to make a decision as to whether he should obtain separate counsel to represent him at the trial. Although I was personally not present at the time, it would be my impression that when Nestor was advised by Judge Judd of the serious nature of the conflict of interest herein, and, in effect, having been told it would be likely that he might be convicted if he did not retain separate counsel, he perceived this as a threat to his relationship to his brother rather than the obvious conclusion that he might or might not be convicted and possibly go to jail.

Nestor Vowteras has always had a confused concept of himself in relationship to his brother. He undoubtedly considered it a disloyalty to have separate lawyers. He was unable to bring himself to the choice of his own counsel because of his neurotic sense of loyalty. He lacked the capacity at the time to choose for his own best interest because of this intense sense of loyalty and in so doing acted against Judge Judd's obvious warning. His mental state may well have been so confused that he was unable to understand the significance of choosing his separate counsel.

It is my considered opinion, knowing him as I do over an extended period of time, that Nestor Vowteras would be torn by the sense of loyalty to his brother and the depressive nature of his personality in times of stress so that he would not likely make a competent decision as to whether or not he should obtain separate counsel to represent him at the trial. In fact, I would doubt that he was capable at that time of making any rational judgment concerning any unfamiliar matter of any importance.

Sworn to before me this
25 day of February, 1974.

Hyman G. Weitzen

Hyman G. Weitzen
Hyman G. Weitzen, M.D.

Louis S. Ferris, M. D.

30 CENTRAL PARK SOUTH
NEW YORK 19, N. Y.

STATE OF NEW YORK
CITY OF NEW YORK
COUNTY OF NEW YORK

Louis S. Ferris, M.D. being duly sworn deposes and says:

That I am a doctor of medicine, duly licensed by the State of New York since 1942 and engaged in the practice of my profession at 30 Central Park South, New York City. I am a graduate of the University of Athens, Greece, 1938; served with the United States Army from 1943 to 1946 as Captain in the Medical Corps; started my private practice of medicine in the City of New York in 1947 specializing in internal medicine. My hospital associations are:

Associate Attending in Medicine at St. Clare's
Hospital, New York City

Assistant Instructor in Medicine, New York Medical
College, Flower & Fifth Ave. Hospital, New
York City,

Assistant Physician, Metropolitan Hospital, New York
City.

I have known Nestor Vowteres since 1969. He has been a patient of mine since 1970. From my first observation and examination of Nestor Vowteres he complained of succumbing to extreme fatigue, depression after ingestion of sweets. After comprehensive

Louis S. Ferris, M. D.

30 CENTRAL PARK SOUTH
NEW YORK 19, N. Y.

clinical and laboratory evaluations I was convinced that his complaints were not due to any organic condition but were a manifestation of depression. Soon thereafter I had the opportunity to observe periods of extreme Euphoria following in a cyclic pattern which, in my judgement, established the classic picture of Manic Depressive Disease.

I strongly urged Mr. Vowteres to obtain psychiatric treatment. When he advised me that he had been seeing Doctor Heiman Weitzen, Psychiatrist, of 55 East 80th St., New York City, and since there was no improvement in the condition, I took upon myself to call Dr. Weitzen at a later date and told him that my impression was that Nestor's condition was of Manic Depressive Disease and that in my opinion he needed intensive psychiatric treatment and care. I found it necessary to prescribe on many occasions various psychotropic drugs. My observation from my close association with him as a physician and friend convinced me that the type of Manic Depressive Disease was of a psychotic nature with paranoid traits; - having accused people, friends and immediate members of the family of unrealistic actions totally out of touch with reality, and making irrational judgments.

I had the occasion to see Mr. Vowteres in severe

Louis S. Ferris, M. D.

30 CENTRAL PARK SOUTH
NEW YORK 19, N. Y.

depression to the point of Catatonic State, both in his home and in my office as recent as November and December, 1973. I was called to his home in desperation to help him out of this state on innumerable occasions. My records indicate that this condition was present when he was in my office on November 3, 1973 and November 7, 1973 at which time I found it necessary to prescribe Lithium as specific for Manic Depressive reactions.

Having read a transcript of proceedings in camera before Honorable Orrin Judd, U.S. District Court Judge on Nov. 27, 1973, wherein Nestor Vowteres was asked to make a decision as to whether he should obtain a separate counsel to represent him at the trial, and wherein Judge Judd, having carefully advised him of the importance of this decision and told him to take some time that day on November 27, 1973 to consult and make a decision and return to him after lunch and advise him if he made such decision, and having learned from Nestor Vowteres that after leaving the Judge's court room he spoke for a few moments to his lawyer and his lawyer's associate and his brother, Nicholas, outside of the court room telling them of the decision that he had to make, and that he spoke to no one else, and that he would not join any of the above mentioned for lunch but instead withdrew to the basement cafeteria in the court house where

Louis S. Ferris, M. D.

30 CENTRAL PARK SOUTH
NEW YORK 19, N. Y.

he had coffee and a sweet crumb bun - the very substance, namely sweets, which he was always complaining made him extremely tired, fatigued and depressed.

It is my considered opinion that Nestor Vowteres was at that time incapable of making any rational judgment and was incapable of making a competent decision as to whether or not he should obtain separate counsel to represent him at the trial.

[Handwritten signature]

Sworn to before me this
21st day of February, 1974

[Handwritten signature]
RICHARD A. LEFKOWITZ

NOTARY PUBLIC STATE OF NEW YORK

NO. 24-2296850

QUALIFIED IN KING COUNTY

COMMISSION EXPIRES MARCH 30, 1975

AFFIDAVIT OF PERSONAL SERVICE

**STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:**

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the *May* day of *31*, 19*74* at No. *U.S. Attorney office, E. D. No. 1* deponent served the within *Appellate Papers* upon the *U.S. Attorney* herein, by delivering a true copy thereof to *him* personally. Deponent knew the person so served to be the person mentioned and described in said papers as the *Appellee* therein.

Sworn to before me,
this *3* day of *May* 19 *74*

Edward Bailey
.....
Edward Bailey

William Bailey
.....
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975